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IN THE

Supreme Court of the United States

October Term, 1972

No. 71-6852

DONALD PAUL LUBIN, individually and on behalf of all others similarly situated,

Petitioner,

vs.

LEONARD PANISH, Registrar-Recorder of the County of Los Angeles,

Respondent.

BRIEF FOR RESPONDENT

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LEONARD PANISH, Registrar-Recorder of the County of Los Angeles,

Respondent.

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

We are satisfied with petitioner's statement of facts at pages 6-8 of his brief.

SUMMARY OF ARGUMENT

There is a compelling state interest in limiting the number of names printed on the ballot. The imposition of a reasonable filing fee (and the filing fees in California are reasonable) is a valid method to so limit the number of names. In the case of the impecunious candidate, the filing fee does not test his pocket book

but rather the extent of his support. Even if an impecunious candidate runs as a representative of the poor, as suggested by petitioner, if he has sufficient integrity, ability, diplomacy, and tact to enable him effectively to represent them, he will attract supporters among whom will be those who can and will make sufficient contributions to pay his filing fee and campaign expenses. If he does not have such support his name should not appear on the ballot.

Petitioner claims that the provision that no votes will be counted for any write-in candidate unless he files a declaration that he is a write-in candidate and pays the same filing fee as that required to obtain a place on the ballot, eliminates any alternative. This provision is reasonable so that non-serious write-in votes for those not candidates, e.g., Al Capone, John the 23d, Mickey Mouse, Superman, need not be counted, but if the lack of alternative renders the requirement of payment of a filing fee invalid, since the write-in provisions were first added in 1968, they, and not the filing fee for a place on the ballot, are unconstitutional, which leaves the impecunious candidate with an alternate means of running for office.

The prohibition of impairment of the right of free speech does not require a public body to supply the facilities to a person to publicize his views. Therefore there is no constitutional right to a place on the ballot as a means of self advertisement.

I

THE FEE REQUIRED BY THE CALIFORNIA ELECTIONS CODE IS A REASONABLE FEE, THE REQUIREMENT OF PAYMENT OF WHICH SERVES A COMPELLING STATE INTEREST AS A VALID TEST OF THE GOOD FAITH OF THE WOULD-BE-CANDIDATE AND HIS SUPPORTERS.

A. The Payment of a Filing Fee by a Candidate and his Supporters Shows Good Faith Anticipation of a Reasonable Possibility of Nomination or Election

1. The State has a Legitimate Interest in Regulating the Number of Candidates on the Ballot.

It is clear after reading the petitioner's brief that we do not agree on exactly what was decided in *Bullock v. Carter* (1972) 405 U.S. 134.[1] We approach with some hesitancy an attempt to tell the members of this Court what they meant when they either authored or concurred in such a recent opinion. We do rely upon the statement at page 145:[2]

> "The Court has recognized that a State has a legitimate interest in regulating the number of candidates on the ballot. * * * In so doing, the State understandably and properly seeks to prevent the clogging of its elective machinery, avoid voter confusion, and assure that the winner is the choice of a majority * * *."

---

[1] 92 S.Ct. 849, 31, L.Ed.2d 92.
[2] 92 S.Ct. at 857, 31 L.Ed.2d at 100-101.

This was quoted by *State ex rel. Apodaca v. Fiorina* (1972) 83 N.M. 663, 495 P.2d 1379, 1381 (Review now pending in this Court Nos. 71-1511, 71-1512). That court noted that *Dillon v. Fiorina* (U.S.D.C. N.M. 1972) 340 F.Supp. 729 invalidated the New Mexico filing fee and that thereafter (495 P.2d 1381):

> "* * * For the office of United States Senator, twenty-eight candidates filed for the Democratic nomination and twelve for the Republican. Of these, three Democrats and one Republican paid filing fees."

The purpose of the ballot is to determine who is the choice of the voters for nomination or election. There is no room on the ballot for one who, although actually desirious of the office for which he files knows that he does not have even a remote chance for nomination or election. No matter how desirous of the office he may be if he knows he has no chance to be either nominated or elected his candidacy is not in good faith.

We have been shown a letter from a high school principal in which he says that, as a class project, all of his students who are eligible to do so are going to run for public office.[3] The election machinery is not designed for this purpose.

---

[3]W recognize that this is not a part of the record as is also true of other examples which we shall give, but as said in *Merced Falls Gas and Eelectric Company v. Turner* (1906) 2 Cal.App. 720, 725, 84 P. 239, 241:

> "* * * This statement cannot be considered as a fact in the case, but it serves to illustrate the consequences which would inevitably follow the application of the doctrine for which appellant [petitioner] contends. * * *"

2. If a Candidate has Substantial Support Sufficient Funds will be Contributed to Pay a Reasonable Filing Fee.

In *Bullock v. Carter, supra,* at page 143[4] this Court says:

> "Unlike a filing fee requirement that most candidates could be expected to fulfill from their own resources *or at least through modest contributions* * * *." (emphasis added.)

Relying upon this case, in *Harper v. Vance* (U.S.D.C. N.D. Ala. S.D. 1972) 342 F. Supp. 136, 140, cited by petitioner at page 11, the court said in a footnote:

> "4. A finding of inability depends not only on a lack of personal resources, but also on a lack of funds contributed by supporters. * * *"

We find no allegation in petitioner's petition to the Supreme Court of California (App. pp. 2-8) or his accompanying declaration[5] (App. pp. 9-10) that his

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[4]92 S.Ct. at 856, 31 L.Ed.2d at 100.

[5]Under California law this statement serves as an affidavit. Section 2015.5 of the Code of Civil Procedures as amended by Cal. Stats. 1963, chapter 2080 page 4346 reads:

> "2015.5. Whenever, under any law of this State or under any rule, regulation, order or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn statement, declaration, verification, certificate, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may with like force and effect be supported, evidenced, established or proved by the unsworn statement, declaration, verification, or certificate, in writing of such person stating the date and place of execution within this State and which is subscribed by him and certified or declared by him to be true 'under penalty of perjury,' which certification or declaration may be in substantially the following form:
>
> "I certify (or declare) under penalty of perjury that the foregoing is true and correct."

sponsors are unable to contribute enough to pay the modest filing fee.

We submit there is compelling logic in the opinion in *State ex rel. Apodaca v. Fiorina. supra* (1972) 83 N.M. 663, 495 P.2d 1379, 1384 (review by this Court requested, Nos. 71-1511, 71-1512) where the court said:

> "Thus viewed in its true light vis-a-vis the candidate of modest means, the filing fee requirement is not designed, nor does it have the effect of, precluding his entree to the ballot, provided he is a serious candidate. In the case of the impecunious candidate, the filing fee does not test his pocket book, but rather, the extent of his support. If he does not have the requisite support, he does not gain entree to the ballot and no harm is done because he had no occasion to be there. Yet, if he is a serious candidate, the filing fee is no impediment.
>
> "We find as a matter of fact that in New Mexico the serious candidate precluded from entree to the ballot by lack of funds does not exist."

We also submit as persuasive the statement in *Wetherington v. Adams* (U.S.D.C. N.D. Fla. 1970) 309 F.Supp. 318, 321:

> "* * * In order to assure serious political candidates it is reasonable to require a reasonable filing fee. A serious candidate for public office has traditionally attracted money for his candidacy. The inability to pay a reasonable filing fee might indicate a lack of potential political support for a person's candidacy."

At pages 9, 16, 21, 26, and 28 petitioner cites *Harper v. Virginia Board of Elections* (1966) 383 U.S. 663 holding invalid the requirement of payment of a poll tax as a prerequisite to voting. As a rule a voter, as distinguished from a candidate, cannot rely on friends or supporters to pay the poll tax for him. Besides, as stated in Footnote 1 on page 664:[6]

> "* * * Section 20 provides that a person must '*personally*' pay all state poll taxes for the three years preceding the year in which he applies for registration. * * *" (emphasis added.)

At page 20 petitioner says:

> "If a candidate cannot pay the filing fees in California, he cannot even be issued nomination papers on which to gather the signatures of his supporters. Although he may have the support of a large number of poor voters, he cannot appear on the ballot unless they are able to raise the amount of the filing fee for him. Obviously, any fees fall more heavily on the poor community."

Again, at page 22, petitioner continues:

> "* * * Candidates who would be most sympathetic to the needs of poor persons would probably come from the poor community and might have difficulty paying the filing fee. Their inability to do so would eliminate them as choices for poor voters resulting in a deprivation of the opportunity for meaningful representation."

[6] 86 S.Ct. 1079, 1080, 16 L.Ed.2d 169, 171.

In other words, petitioner pictures a poor candidate the supporters of whom are also uniformally so poor that none of them can make even modest contributions to the payment of a filing fee and campaign expenses.

It may be that one candidate may have a larger percentage of poor people among his supporters than does another candidate. Even if, however, the candidate's only platform is aid to the indigent and needy, his supporters will not necessarily be confined to that class. Many persons in comfortable circumstances, even wealthy persons, are aware of, and sympathetic with, the plight of those less fortunate. They will support the candidate if they have confidence in his integrity and ability. The petitioner in the case at bench has received the services of excellent attorneys worth many times the filing fee. This, as well as many other instances, does illustrate that persons by no means poor will donate both time and money to sponsor projects which they believe are for the benefit of the poor. Cynical as we are tempted to be at times it must be recognized that many voters will vote for propositions which are of no benefit to them. For example, the continuous extension of the franchise has been accomplished by those already possessing the right to vote. The Fifteenth Amendment was accomplished largely by the votes of Caucasians, the Nineteenth by the votes of men, the Twenty-sixth by the votes of those already over twenty-one years of age.

A person because he is poor may, for that reason, be motivated to take the part of others in the same un-

fortunate condition, although this is not always necessarily so. (When he receives the first installment of his salary as supervisor he no longer is poor.) Motivation, however, is not enough. In order to be effective in his efforts to ameliorate the plight of the poor, he must have, in addition to the qualifications required by law, a high degree of integrity, ability, diplomacy, and tact. If he has such qualifications he will attract supporters among whom will be many both able and willing to make sufficient contributions both to pay the modest filing fee and to effectively campaign.

If the petitioner in the case at bench had a large number of supporters none of whom could contribute he should have so alleged. We find no such allegation either in the petition itself (App. pp. 2-8) or in the statement under penalty of perjury attached thereto. (App. pp. 9-10).[7] It is not a matter of which either this Court or the Supreme Court of California can take judicial notice.

> "* * * If there is any doubt whatever either as to the fact itself or as to its being a matter of common knowledge, evidence should be required. (*Varcoe v. Lee,* 180 Cal. 338, 345 [181 P. 223].)"
>
> *Barreiro v. State Bar* (1970) 2 Cal.3d 912, 925, 88 Cal.Rptr. 192, 471 P.2d 992, 1000.

The court refused to take judicial notice that being first on a list of candidates on the ballot was an advantage in both *Mexican-American Political Associa-*

[7]See footnote 5 *supra.*

tion v. Brown (1973) 8 Cal.3d 733, 734, 106 Cal.Rptr. 12, 13, 505 P.2d 204; and *Diamond v. Allison* (1973) 8 Cal.3d 736, 737, 106 Cal.Rptr. 13, 14, 505 P.2d 205.

We cite these cases since judicial notice is a matter of state law. *Wear v. State of Kansas* (1917) 245 U.S. 154, 158.[8]

The champions of the poor are not confined to the poor, themselves. It would seem, therefore, well nigh impossible that a would-be-candidate would have extensive backing but backing consisting entirely of people so poor that they could not contribute. If that peculiar situation should ever arise it will then be time enough to decide whether the California Elections Code deprives such a would-be-candidate and his supporters of any constitutional rights. In *Broadrick v. State of Oklahoma* (No. 71-1639, June 25, 1973) 41 Law Week 5111 this Court upheld an Oklahoma statute which, among other provisions, prohibited a state employee from being a candidate for paid public office. At page 9 Slip Opinion, at page 5114, 41 Law Week this Court noted that the appellants:

> "* * * maintain that the statute is overbroad and purports to reach protected, as well as unprotected conduct, and must therefore be stricken down on its face and held to be incapable of any constitutional application. We do not believe that the overbreadth doctrine may appropriately be invoked in this manner here.

[8]38 S.Ct. 55, 56, 62 L.Ed. 214, 218.

"Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge the statute on the ground that it may conceivably be applied unconstitutionally to others in other situations not before the Court. * * *"

As we said before there is no allegation either in the petition (App. pp. 2-8) or in the accompanying statement under penalty of perjury (App. p. 9-10)[9] that the petitioner is supported by a large number of persons all of whom are too poor to contribute towards the modest filing fee. For aught that appears, petitioner had no support whatever and, had his name been on the ballot he would have received but a handful of votes. The petitioner is in no position to attack the application of the Elections Code to that peculiar situation which does not apply to him.

3. Neither the State nor the County should Pay Campaign Expenses.

At page 18 petitioner says:

"The costs of campaigning for elective public office are notoriously high, and indeed prohibitive for many prospective candidates otherwise qualified and having substantial popular support. For a poor candidate and his supporters proposing to finance a campaign on a low budget, the requirement of a $701.60 filing fee may make the differ-

[9]See footnote 5 *supra*.

ence between a candidacy which is viable and one which has no chance at all."

In other words no filing fee should be charged so that that small sum can be added to the campaign chest. The cost of campaigning being as notoriously high as petitioner states, the use of $701.60 for a filing fee should make no difference at all. When we said at the end of our Points and Authorities in the State Supreme Court (App. p. 37) quoted by petitioner at page 21:

> "* * * we do not concede, of course, that a poor person is necessarily unable to obtain the filing fee."

We did not ignore:

> "* * * the spirit of *Adkins v. Du Pont de Nemours Co.*, 335 U.S. 331 (1948), in which the Court ruled that a person need not be totally destitute to file in Forma Pauperis. * * *"

This Court did say at page 339:[10]

> "* * * We think an affidavit is sufficient which states that one cannot because of his poverty 'pay or give security for costs * * * and still be able to provide' himself and dependents 'with the necessities of life.' To say that no persons are entitled to the statute's benefits until they have sworn to contribute to payment of costs, the last dollar they have or can get, and thus make themselves and their dependents wholly destitute, would be to con-

[10] 69 S.Ct. 85, 89, 93 L.Ed. 43, 49.

strue the statute in a way that would throw its beneficiaries into the category of public charges. The public would not be profited if relieved of paying costs of a particular litigation only to have imposed on it the expense of supporting the person thereby made an object of public support. * * *"

Petitioner need not render himself an indigent and dependent upon county indigent relief but campaign expenses are not necessities of life. That some candidates have more campaign funds than do others does not result in an unconstitutional discrimination. As this Court said in *San Antonio Independent School District v. Rodriguez* (1973) 410 U.S. ..... Slip Opinion at page 17:[11]

"* * * in *Douglas v. California,* 372 U.S. 353, (1963), a decision establishing an indigent defendant's rights to court appointed counsel on direct appeal, the Court dealt only with defendants who could not pay for counsel from their own resources and who had no other way of gaining representation. *Douglas* provides no relief for those on whom the burdens of paying for a criminal defense are relatively speaking, great but not insurmountable. Nor does it deal with relative differences in the quality of counsel acquired by the less wealthy.

"*Williams v. Illinois,* 399 U.S. 235 (1970), and *Tate v. Short,* 401 U.S. 395 (1970), struck down criminal penalties that subjected indigents to incarceration simply because of their inability to

[11]93 S. Ct. 1278, 1290, 36 L.Ed.2d 16, 36.

pay a fine. Again, the disadvantaged class was composed only of persons who were totally unable to pay the demanded sum. Those cases do not touch on the question whether equal protection is denied to persons with relatively less money on whom designated fines impose heavier burdens. The Court has not held that fines must be structured to reflect each person's ability to pay in order to avoid disproportionate burdens. Sentencing judges may, and often do, consider the defendant's ability to pay, but in such circumstances they are guided by sound judicial discretion rather than by constitutional mandate."

4. Since the Requirement of a Filing Fee serves a Compelling State Interest, insofar as it may bar a Frivolous Candidate from the Ballot it does not Discriminate against the Poor.

We assume that petitioner's argument is based on the premise that the requirement of a filing fee does not serve any compelling state interest. We also assume that petitioner concedes that if it be shown that it does serve such a purpose then it is valid even if it makes impossible the candidacy of a person having neither funds of his own nor supporters. In *Gant v. Oklahoma City* (1933) 289 U.S. 98, 102[12] this court held valid requiring a license and posting of a bond in order to drill an oil well in the city even as to one who could not obtain a bond. The theory on which this decision was based is well stated in *Watson v.*

[12]53 S.Ct. 530, 532, 77 L.Ed. 1058, 1062.

Division of Motor Vehicles (1931) 212 Cal. 279, 298 P. 481. In that case the court held valid Section 73(g) of the former California Vehicle Act which provided that fifteen days after a judgment against a motorist for damages on account of personal injury or for damages to property in excess of one hundred dollars became final, if the judgment had not been paid the motorist's driver's license would be suspended until it was paid. It was contended that this was a discrimination against the poor and unconstitutional on the ground that, under its terms, a person's license to operate a motor vehicle was made dependent upon his ability to pay and discharge judgments rather than upon his ability to operate such vehicle. The court held to the contrary, saying, at page 284:[13]

> "* * * The fallacy in this argument lies in the failure to distinguish between equality of opportunity and ability to take advantage of the opportunity which is offered to all. The equality of the Constitution is the equality of right and not of enjoyment. * * *"

This is quoted with approval by *Escobedo v. State of California* (1950) 35 Cal.2d 870, 878, 222 P.2d 1, 6, the court adding:

> "* * * Those who cannot afford to possess automobiles are as little able to enjoy the opportunity of driving on the public highways as those who cannot afford insurance or security."

[13] 298 P. at p. 483.

At page 16 the petitioner cites *Ferguson v. Keays* (1970) 4 Cal.3d 649, 94 Cal.Rptr. 398, 484 P.2d 70 where, because of poverty, the $50.00 fee for filing a record on appeal was waived. The distinction between that case and the case at bench is explained in *Orr v. Superior Court* (Cal.App. 1968) 73 Cal. Rptr. 830, 835 in which the court after quoting from *Escobedo, supra,* said:

> "* * * The denial of counsel on appeal to an indigent defendant in a criminal proceeding may draw an 'unconstitutional line . . . between rich and poor' (see *Douglas v. California* (1963) 372 U.S. 353, 357 [9 L.Ed. 2d 811, 814, 83 S.Ct. 814]), because the pecuniary ability to secure counsel is not rationally related to the right or privilege to have the conviction reviewed. There is, however, a rational relationship between the pecuniary ability to respond in damages and the operation of a motor vehicle. * * *"

The State Supreme Court granted a hearing on February 5, 1969 and came to the same ultimate conclusion as did the Court of Appeal that the petition for writ of prohibition be denied. 71 Cal.2d 220, 77 Cal.Rptr. 816, 454 P.2d 712.[14] The opinion of the Court

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[14] Both *Escobedo* v. *State of California, supra,* and *Orr* v. *Superior Court,* were overruled on other grounds by *Rios v. Cozens* (1972) 7 Cal.3d 792, 799, 103 Cal.Rptr. 299, 304, 499 P.2d 979 but nothing in the latter case disapproves the reasoning of the Court of Appeal quoted by us in *Escobedo, supra.*

of Appeal is not precedent therefore, but we quote it for the reasoning therein contained.[15]

B. The Filing Fee is Reasonable in Amount.

In *Bullock v. Carter, supra* (1972) 405 U.S. 134, 143,[16] this Court said:

> "Unlike a filing fee requirement which most candidates could be expected to fulfill from their own resources or at least through modest contributions, the very size of the fees imposed under the Texas system gives it a patently exclusionary character. * * *"

The California filing fees are set by statute, not by political parties as was the case in Texas. In the case at bench the filing fee is but two per cent of the first year's salary. As noted by *State ex rel. Apodaca v. Fiorina, supra* (1972) 83 N.M. 663, 495 P.2d 1379, 1384 (Review by this Court requested, Nos. 71-1511, 71-1512):

> "* * * The modest six per cent does not leap from the page as does the 99.7 percent Texas fee for one office recounted in Bullock."

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[15]Without in any way relying upon opinions of the Court of Appeal as precedent where the State Supreme Court has granted a hearing, California courts have cited such opinions for the persuasiveness of the reasoning contained therein. *Roylance* v. *San Luis Hotel Company* (1887) 74 Cal. 273, 279, 20 P. 573, 579; *Dresser v. City of Torrance* (1956) 140 Cal.App.2d 42, 48, 294 P.2d 962, 966; *Blatz Brewing Co.* v. *Collins* (1945) 69 Cal. App.2d 639, 650,160 P.2d 37, 43; *Montaldo v. Hires Bottling Co.* (1943) 59 Cal.App.2d 642, 649, 139 P.2d 666, 670.

[16]92 S.Ct. 849, 856, 31 L.Ed.2d 92, 100.

In *Bullock, supra* at page 149[17] this Court has compared a fee imposed on a candidate with a license fee. A license fee so large as to in effect prohibit a legitimate business has been held confiscatory and unconstitutional, *McGahey v. Virginia* (1890) 135 U.S. 662, 701,[18] but we have found no case holding a reasonable license fee to be invalid as applied to some one having no money to pay it.

Requirements in the State of Florida that a candidate pay a fee of five per cent of the annual salary have been held to be reasonable in a number of cases.

Spillers v. Slaughter (U.S.D.C.M.D. Fla. 1971) 325 F.Supp. 550 in which at page 553 the court held that there was a compelling state interest requiring the fee. (Under the title *Pope v. Haimowitz* (U.S. 1971) 404 U.S. 806,[19] this Court vacated the judgment and remanded the case to the District Court with directions to dismiss as moot.)

Wetherington v. Adams, supra (D.C.N.D. Fla. 1970) 309 F.Supp. 318;

Fowler v. Adams (D.S.M.D. Fla. 1970) 315 F. Supp. 592 at 594;

Diffenderfer v. Porter Homer (D.C.S.D. Fla. No. 68-455, Cir.E.C.), unreported but cited by *Spillers v. Slaughter, supra;*

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[17]92 S.Ct. 849, 859, 31 L.Ed.2d 92, 103.

[18]10 S.Ct. 972, 984, 34 L.Ed. 304, 316.

[19]92 S.Ct. 55, 30 L.Ed.2d 37.

A filing fee of $875 was held reasonable for a candidate for justice of the State Supreme Court in *Bodner v. Gray* (Fla. 1961) 129 So.2d 419, 420, 89 A.L.R.2d 860, 863 (and note annotation at page 864.)

C. There is no other Practical Test of the Good Faith of a Candidate.

At page 14 petitioner says:

> "In *Ferguson v. Keays,* 4 C.3d 649, 94 Cal. Rptr. 398, 484 P.2d 70 (1970), the California Supreme Court approved in principle the waiver of the $50 fee for filing a record on appeal despite the argument that filing fees defray the costs of courts and discourage unnecessary litigation."

The following portion of the opinion in that case, 4 Cal.3d at 658, 94 Cal.Rptr. at 403, 484 P.2d at 75 illustrates the difference between determining the good faith of an appellant and the good faith of a candidate:

> "Thus, there is ample precedent for requiring, as a condition to the grant of in forma pauperis relief, that each applicant establish to the court's satisfaction that he is in fact indigent and that his claim or defense is not wholly frivolous. With respect to applications for such relief at the appellate level, we believe that the applicant should, at a minimum, submit (1) the certificate of his counsel, declaring that he is familiar with the facts underlying the action or appeal, that in his opinion his client's contentions have merit, and that the

action or appeal is brought in good faith and not for purposes of delay or harassment, and (2) the declaration of the applicant, executed under penalty of perjury, stating that he is unable to pay the requisite filing fee without depriving himself or his dependents of the necessaries of life, and briefly setting forth the facts which disclose his indigence."

Petitioner has suggested no other way in which the good faith of a candidate can be tested. He might be required to submit an affidavit that he has supporters and, at least, a remote chance of success, but any candidate could file such an affidavit without fear of prosecution for perjury since the affidavit would be largely an opinion the falsity of which would be impossible to prove.

D. The Elections Code does not Deny the Right of a Voter to have his Vote Counted.

At page 23 petitioner says:

"If poor people cannot run candidates from within their own community for lack of resources, then the right to vote and the constitutional guarantees of respresentation are meaningless. * * *"

If petitioner should convince this Court that the Election Code unconstitutionally denies the right to be a *candidate* then whether or not it also denies the rights of the voters need not be decided. It is only if it is determined that no rights of the *candidate* is in-

fringed that this contention becomes material. In *Samuels v. Hite* (1950) 35 Cal.2d 115, 216 P.2d 879 the court directed that the name of a candidate for office of judge of a justice court be removed from the ballot because he was not eligible for that office. Obviously no one has a constitutional r i g h t to have his vote counted for a candidate who is ineligible for the office he seeks.[20] By analogy, no one has a constitutional right to have his vote counted for one who fails to qualify as a candidate.

At page 21 petitioner says:

> "Assume that the candidate could collect $1.00 from each of 702 persons in his community to meet the filing fee requirement for Board of Supervisors in Los Angeles County. But then to the extent that these 702 voters have been *required* to contribute funds in order to have their vote recorded for the candidate of their choice, they have been required to pay an indirect poll tax. Such a tax has been proscribed in *United States v. Texas,* 252 F. Supp. 234, 384 U.S. 155, *supra* * * *."

This argument proves too much. Assume that a group of voters urge a voter to be a candidate. Assume, also, either that the office does not require a filing fee or that the proposed candidate has ample funds of his own with which to pay the filing fee. The candidate might say:

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[20]This, of course, does not apply to a candidate for member of a legislative body which body is the exclusive judge of the qualification of its members. The Board of Supervisors is not such an exclusive judge.

"I am unwilling to be a candidate unless you will contribute sufficient funds for an effective campaign."

In that situation can it be said that those urging his candidacy must pay what amounts to a poll tax in order to vote for him? In that case the candidate says he cannot afford to run unless he has financial support. It is the same if the candidate cannot pay his filing fee from his own funds. He refuses to be a candidate unless his supporters give him financial aid.

E. Petitioner's Cases Are Not Persuasive.

We, already, have cited and distinguished some the cases cited by the petitioner.

At pages 7 and 18 petitioner cites *Chote v. Brown* (U.S.D.C.N.D. Cal. 1972) 342 F.Supp. 1353 (remanded 93 S.Ct. 1732, 36 L.Ed.2d 420). We submit that the dissenting opinion is far more persuasive than that of the majority.[21]

At pages 8, 11, and 27 petitioner cites *Turner v. Fouche* (1970) 396 U.S. 346 in which this Court held invalid a requirement that a member of the school board must be a property owner. This Court however, also said, at page 364:[22]

"* * * Without excluding the possibility that

[21] In *Mitchell* v. *Van Pelt* (1954) 58 N.M. 69, 265 P.2d 679, 680, 42 A.L.R. 2d 1211, 1215 the court said:
"*** when the problem is one of first impression in our own jurisdiction, dissenting opinions from Courts of other states can assist this Court in determining the better of two lines of authority."

[22] 90 S.Ct. 532, 542, 24 L.Ed.2d 567, 581.

other circumstances might present themselves in which property qualification for office-holding could survive constitutional scrutiny * * *"

About five weeks after this decision, this Court denied certiorari (397 U.S. 906)[23] in *Schweitzer v. Clerk for City of Plymouth* (1969) 381 Mich. 484, 164 N.W. 2d 35 at 39 which held that ownership of real property was a valid qualification for holding a city office.

In both *Harper v. Vance, supra* (U.S.D.C.N.D. Ala. S.D. 1972) 342 F.Supp. 136 at 143 cited by petitioner at page 11 and *Jeness v. Little* (U.S.D.C.N.D. Ga. 1969) 306 F.Supp. 925, 929 (Appeal dismissed as moot, sub nominee *Matthews v. Little* (1970) 397 U.S. 94)[24] cited at pages 10 and 11 it seems to be assumed that no filing fee whatever may be charged directly contrary to this Court's decision in *Bullock, supra.*

At page 14 petitioner relies upon *Serrano v. Priest* (1971) 5 Cal.3d 584, 96 Cal.Rptr. 601, 487 P.2d 1241. This case was cited eight times by *San Antonio Independent School District v. Rodriguez, supra* (1973) 410 U.S. ___ at ___ Slip Opinion pp. 11, 14, 18, 23, 25, 38, 51-52, and 53[25] and, at least insofar as any question under the Constitution of the United States was concerned, impliedly was overruled.

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[23] 90 S.Ct. 896, 25 L.Ed.2d 86.

[24] 90 S.Ct. 820, 25 L.Ed.2d 81.

[25] 93 S.Ct. 1278, 1287, 1289, 1291, 1293, 1294, 1301, 1308, 1309, 36 L.Ed.2d 16, 32, 34, 37, 39, 40, 48, 56, 57.

II

IF THE CONSTITUTION OF THE UNITED STATES REQUIRES AN ALTERNATIVE TO PAYING A FILING FEE, CANDIDATES IN CALIFORNIA HAVE SUCH AN ALTERNATIVE.

A. If Elections Code § 18602 Requiring Payment of a Fee before Write-in Votes are Counted renders Requirement of a Filing Fee to go on Ballot Unconstitutional it is § 18602 not § 6554 (which requires a filing fee to have Name printed on Ballot) which is Unconstitutional.

Chapter 8.5 (beginning with Section 18600) of Division 10 of the Elections Code provides for the counting of write-in votes. It requires that a person desiring to be a write-in candidate file a statement to that effect with the registrar-recorder at least eight days prior to the election. Section 18603 reads:

> "18603. No name written upon a ballot in any state, county, city, city and county, or district election shall be counted for an office or nomination unless
>
> "(a) A declaration has been filed pursuant to Sections 18601 and 18602 declaring a write-in candidacy for that particular person for that particular office or nomination and
>
> "(b) The fee required by Section 6555 is paid when the declaration of write-in candidacy is filed pursuant to Section 18602."

These provisions are reasonable and make it unnecessary to count votes for persons (or for comic strip characters such as Mickey Mouse) who are not candidates at all. We are informed that voters have written in names of John the 23d, John Doe, Joe Doe, Joe Blow, Dick Tracy, Mortimer Snud [Snerd], Khrushchev, Al Capone, Annie Oakley as well as real persons who received one or two votes each.

Petitioner at pages 13 and 17 stresses that because of the provisions of subdivision (b) of Section 18603 of the Elections Code there is no alternative to paying the filing fees.

Let us assume (without conceding) that the requirement of a filing fee to have a candidate's name printed on the ballot is invalid (at least as applied to a candidate where neither he nor his supporters can pay it) unless there is some alternative such as candidacy by write-in.

Chapter 8.5 (beginning with Section 18600) was first added to Division 10 of the Elections Code by California Statutes 1968, chapter 79, page 236 which took effect as an urgency measure on May 9, 1968 so as to be in effect for the June 4, 1968 primary. Prior thereto all write-in votes were counted although no fee had been paid. We shall show *infra* p. 28 that the opportunity to nominate or elect a candidate by write-in is a valid alternate. Therefore, prior to May 9, 1968 the requirement of payment of a fee to have a candidate's name printed on the ballot was valid.

Where unconstitutionality results from a statutory amendment it is the amendment which is invalid and not the original portions of the statute.

Frost v. Corporation Commission (1929) 278 U.S. 515, 526;[26]
Truax v. Corrigan (1921) 257 U.S. 312, 341;[27]
Eberle v. Michigan (1914) 232 U.S. 700, 705.[28]

As said by this Court in *Waters-Pierce Oil Company v. State of Texas* (1900) 177 U.S. 28, 47:[29]

"* * * It is either constitutional or unconstitutional. If it is constitutional the plaintiff in error has no legal cause to complain of it. If unconstitutional, it does not effect the act of 1889, and that, as we have seen, imposes a valid condition upon the plaintiff in error * * *."

This Court said in *Reitz v. Mealey* (1941) 314 U.S. 33, 38-39:[30]

"* * * under the law of New York, a statute in itself constitutional is not affected by an unconstitutional amendment;—the amendment dropping out and the original act remaining in force * * *"

The Courts in California are in accord.

Danskin v. San Diego Unified School District (1946) 28 Cal.2d 536, 555, 171 P.2d 885, 897;

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[26] 49 S.Ct. 235, 239, 73 L.Ed 483, 490.
[27] 42 S.Ct. 124, 132-133, 66 L.Ed. 254, 267, 27 A.L.R. 375, 390.
[28] 34 S.Ct. 464, 465, 58 L.Ed. 803, 805.
[29] 20 S.Ct. 518, 525, 44 L.Ed. 657, 665.
[30] 62 S.Ct. 24, 28, 86 L.Ed. 21, 25.

Miller v. Union Bank and Trust Company (1936) 7 Cal.2d 31, 36, 59 P.2d 1024, 1027 (Certiorari denied 299 U.S. 612):[21]

Keech v. Joplin (1909) 157 Cal. 1, 9, 106 P. 222, 226;

Skyline Materials, Inc. v. City of Belmont (1961) 198 Cal.App.2d 449, 459, 18 Cal. Rptr. 95, 101;

City of Los Angeles v. Lelande (1909) 11 Cal. App. 302, 307, 104 P. 717, 719.

If it be assumed that an alternate not requiring a fee, is necessary then it is either Chapter 79 of the California Statutes of 1968 which added Chapter 8.5 to Division 10 of the Elections Code or subdivision (b) of Section 18603 (a part of Chapter 8.5) which is unconstitutional leaving the remainder of the Elections Code insofar as fees are concerned as it read prior to 1968.

Section 14 of Senate Bill No. 1236 as amended in the California Senate on June 15, 1973 will, if enacted as so amended, amend Section 18603 of the Elections Code to eliminate paragraph (b) thereof and thereby eliminate the requirement of any fee for a write-in candidate. If this bill is enacted so as to make this amendment, we shall inform the Court by supplementary brief.

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[21] 157 S.Ct. 314, 81 L.Ed. 451.

B. A Write-in Vote is a Valid Alternate.

In *Wetherington v. Adams, supra* (U.S.D.C.N.D. Fla. 1970) 309 F.Supp. 318, 320 the court said:

> "* * * Additionally, the filing fee precondition does not constitute a total denial to persons desirous of candidacy of having votes cast for them and counted; they can run as write-in candidates by following the non-cost procedures of Fla. Stat. § 99.023 * * *."

At page 322 the court continued:

> "* * * There may be some disadvantages to a write-in candidacy but it does provide a means whereby any citizen, regardless of his political support or his individual wealth, can present himself to the voters for their consideration."

In the unreported case of *Haag v. State of California* (U.S.D.C.C.D. Cal. Aug. 2. 1970, No. 70-426-R) the court said:

> "2. A write-in candidacy is as constitutionally acceptable a method of running for public office as appearing on the printed election ballot."

In *Roberts v. Cleveland* (1944) 48 N.M. 226, 149 P.2d 120, 153 A.L.R. 635 a section in the New Mexico election laws providing that no person shall become a candidate for nomination for any office who has changed his party affiliation within twelve months prior to the issuance of the Governor's proclamation was attacked on the claim that it attempted to add to

the qualifications of persons who are qualified to hold the office of Representative in Congress of the United States. In rejecting this contention the court said (149 P.2d at 122, 153 A.L.R. at 638):

> "* * * The right to be a candidate at the general election by the 'write in' method is provided for. He may be such a candidate, independently of all parties * * *."

The distinction between being a candidate and having one's name printed on the ballot was also explained in *State ex. rel. O'Sullivan v. Swanson* (1934) 127 Neb. 806, 257 N.W. 255. A Nebraska statute provided that a candidate defeated in the primary could not have his name printed on the ballot at the general election as an independent candidate. The court construed this prohibition as applying to any office not only the office for which the candidate was defeated in the primary. In holding that this statute prohibited one defeated in the primary for nomination for Governor from having his name on the ballot at the general election as a candidate for the United States Senate, the court said, at pages 255 and 256:

> "* * * The issue here is whether the relator is entitled to have his name printed on the ballot as a candidate nominated by petition, regardless of the Driscoll decision because the office relator seeks is a federal office rather than a state office. The question is not whether he may be a candidate, but whether he may be nominated by petition and

have his name printed on the ballot at the state's expense. He may be a candidate and if electors write his name on the ballot in sufficient numbers he will be elected."

So far as we can find neither of these last two cases has been overruled or disapproved. We submit that the reasoning in each is persuasive and should be followed.

Candidates have been elected by write-in. For example in *Miller v. Childs* (1915) 28 Cal.App. 478, 152 P. 972 a candidate at the primary for the office of Superior Court judge received a majority of all votes cast and, under the Direct Primary Law, as it then read, was the only candidate whose name appeared on the ballot for the general election. J. L. Childs, the candidate (or a candidate)[22] defeated in the primary for that same office conducted a write-in campaign and was elected.

Also, it cannot be said that because of the existence on the statute books of Section 18603 of the Elections Code it would be impossible to conduct a write-in campaign. In *Steiner v. Mihaly,* No. S.F. 22965 on October 18, 1972 the Supreme Court of California made the following interim order:

"It is hereby ordered that respondents Emmery Mihaly * * * Edmund G. Brown, Jr., Secretary of State of California, accept without requiring the payment of the fee prescribed by Sections 6555 and 18603, subdivision (b) of the Elec-

[22]Although not appearing in the reported opinion the transcript on appeal in this case, No. Third Civil 1396 shows that J. L. Childs was the only candidate.

tions Code, the declaration of write-in candidacy of petitioner Herbert Steiner for the office of Member of the House of Representatives of the United States from the Fifth Congregressional District of California, at the general election to be held November 7, 1972, if said declaration is offered to said respondent Registrar of Voters in proper form and within the time prescribed by law, and that said respondents count and record all votes cast for such petitioner in such election, reserving to this court jurisdiction to determine whether such filing fee prescribed by the aforesaid sections of the Elections Code is lawfully required."

C. Elections Code § 6555 (Candidate nominated by Write-In must Pay Filing Fee) is Valid.

In his Points and Authorities filed in the State Supreme Court (App. p. 15) the petitioner said:

"* * * Even before write-in votes will be counted, the filing fees must be paid under Elections Code Section 6555."

The section does not so provide. It reads:

"6555. When a person for whom a declaration of candidacy has not been filed is nominated for an office by having his name written on the ballot, he shall pay the same filing fee that would have been required if his declaration had been filed. If he does not pay that fee his name shall not be printed on the ballot at the ensuing general election."

The section clearly specifies that it is only after a candidate has been nominated that he must pay the filing fee. The enactment of Section 18603 of the Elections Code in 1968 specifically requiring the payment of a fee by a write-in candidate before write-in votes will be counted is a legislative construction of Section 6555 that that section does not do so.

"* * * subsequent legislation may be considered to assist in the interpretation of prior legislation upon the same subject. * * *"

Tiger v. Western Investment Co. (1910) 221 U.S. 286, 309;[33]

Great Northern Ry Co. v. United States (1942) 315 U.S. 262, 277.[34]

This is the law in California.

McDonough Power Equipment Co. v. Superior Court (1972) 8 Cal. 3d 527, 534, 105 Cal.Rptr. 330, 335, 503 P.2d 1338, 1343, footnote 5;

Bateman v. Colgan (1896) 111 Cal. 580, 587, 44 P. 238, 240;

Payne v. The City of San Francisco (1853) 3 Cal. 122, 128.

"* * * even an unconstitutional part of a statute may be examined for the purpose of ascertaining the scope and effect of the valid parts thereof. (*Ex parte Fedderwitz,* 6 Cal.Unrep. 562, 572 [62 Pac. 935, 940]; 36 Cyc. 1131, 1132.)"

[33]31 S.Ct. 578, 584, 55 L.Ed. 738, 747.
[34]62 S.Ct. 529, 535, 86 L.Ed. 836, 844.

Crooks v. People Finance etc. Co. (1930) 111 Cal. App.Supp. 769, 775, 292 P. 1065;

Beneficial Loan Soc. Ltd. v. Haight (1932) 215 Cal. 506, 514, 11 P.2d 857, 860.

Accord, *People v. Campbell* (1930) 110 Cal.App. Supp. 783, 786, 291 P. 161, 162.

If a candidate receives sufficient votes to be nominated for a nonpartisan office, there should be no difficulty in obtaining from supporters the filing fee.

D. Elections Code § 6555 is Severable.

If there is any question as to the validity of Section 6555 of the Elections Code it is clearly severable. As this Court said in *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO* (1973) 41 Law Week 5122, 5129, Slip Opinion p. 22.

> "* * * As we see it, our task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations. * * *"

In both *Tilton v. Richardson* (1971) 403 U.S. 672, 684,[35] and *United States v. Jackson* (1968) 390 U.S. 570, 585[36] this Court quotes, as follows, from *Champlain Rfg. Co. v. Commission* (1932) 286 U.S. 210, 234:[37]

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[35] 91 S.Ct. 2091, 2098, 29 L.Ed.2d 790, 802 (rehearing denied, 404 U.S. 874, 92 S.Ct. 25, 30 L.Ed.2d 120).

[36] 88 S.Ct. 1209, 1218, 20 L.Ed.2d 138, 149.

[37] 52 S.Ct. 559, 565, 76 L.Ed.2d 1062, 1078, 86 A.L.R. 403, 413.

"* * * The unconstitutionality of a part of an Act does not necessarily defeat * * * the validity of its remaining provisions. Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law. * * *"

Section 6555 could be eliminated entirely from the Elections Code and what would be left would be:

"* * * fully operative as a law. * * *"

Section 48 of that code reads:

"48. If any provision of this code or the application thereof to any person or circumstance is held invalid, the remainder of the code and the application of such provision to other persons or circumstances shall not be affected thereby."

After quoting a similar provision in the Business and Professions Code the court said in *Blumenthal v. Board of Medical Examiners* (1962) 57 Cal.2d 228, 238, 18 Cal.Rptr. 501, 506, 368 P.2d 101, 106:

"* * * The test of severability is whether the invalid parts of the statute can be severed from the otherwise valid parts without destroying the statutory scheme, or the utility of the remaining provisions. * * *"

This is quoted and followed by *Curtis v. Board of Supervisors* (1972) 7 Cal.3d 942, 964, 104 Cal.Rptr. 297, 312, 501 P.2d 537.

Section 6555 meets this test. Its elimination would not affect the remainder of the Elections Code in any way.

In *Kelso v. Cook* (1916) 184 Ind. 173, 202, 110 N.E. 987, 997, Ann.Cas. 1918E 68, 78 from which petitioner quotes at page 27 of his brief the court held severable from the direct primary law a provision requiring fees for printing names of candidates on the ballot.

III

THE FILING FEE REQUIREMENT DOES NOT IMPAIR THE RIGHT OF FREE SPEECH.

A. The Filing Fee Requirement does not Impair the Right to Campaign.

Petitioner contends that the Election Code denies the right of free speech and assembly. In a situation such as *Bullock v. Carter, supra* where the election laws deny a constitutional right to be a candidate and, indirectly, a constitutional right to have one's vote counted for the candidate of one's choice, a decision to that effect is all that one desiring to be a candidate needs and, whether or not the election laws also deny the right of free speech and assembly need not be determined.

We submit, therefore, that whether or not *Mr. Lubin* has been denied the right of free speech or public assembly is material only if it is decided that no right

to be a candidate or to have a vote counted otherwise has been impaired. At page 26 petitioner says:

> "Campaigns for any political office consist of rallies, campaign speeches by the candidates and his staff, destribution of leaflets. All are First Amendment activities—speech, publication, assembly. The opportunity to campaign is an opportunity to secure public attention to one's views and to engage other candidates in debate of vital issues."

This is an ingenious argument but it proves too much. In *Samuels v. Hite, supra* (1950) 35 Cal.2d 115, 216 P.2d 879 the court held that the name of a candidate for office of judge of a justice court must be removed from the ballot because he did not have the required qualifications. Petitioner would say that the right of free speech of his supporters had been impaired because no urging of voters to vote for him would be effective. Petitioner's argument extended to its logical conclusion goes even further. The right to urge people to vote for a candidate is impaired if that candidate cannot take office. Therefore to require a judge or district attorney to be admitted to practice law or a health officer to be admitted to practice medicine impairs the right of free speech and assembly.

This Court said, in *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO, supra* (1973) 41 Law Week 5122, 5124, Slip Opinion p. 7.

> "We unhesitantly reaffirm the *Mitchell* hold-

ing * * *. An Act of Congress * * * would in our view unquestionably be valid * * * if, in plain and understandable language, the statute forbade activities such as * * * becoming a partisan candidate for, or campaigning for, an elective public office * * *. Our judgment is that neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees."

B. A Candidate Who has No Chance to Be Elected is not Entitled to a Place on the Ballot to Build up Support in Future Elections.

At page 27 the petitioner quotes from *Kelso v. Cook, supra* (1916) 184 Ind. 173, 202, 110 N.E. 987, 996, Ann.Cas. 1918E 68, 78 in which the court held the Indiana primary law valid but held invalid the provision requiring a filing fee equal to one per cent of the first year's salary on the ground that it was discriminatory as to minor political parties. We submit that the reasoning of the court is most unconvincing. Besides, the decision seems to be based upon provisions of the Indiana State Constitution as appears from that portion of the opinion immediately following that quoted by petitioner:

"It may be as contended, that in some jurisdictions, provisions quite similar to this have been upheld by the courts, but it is believed that in such cases, there are constitutional provisions differing from ours. * * *"

The right of a new political party to be on the ballot is not the same as that of a private individual.

If petitioner is not a serious candidate his right of free speech does not require that he be permitted a place on the ballot to advertise himself and make his name known to the public. Government may not prohibit or cast obstacles in the way of the exercise of free speech but it is under no affirmative duty to provide facilities for its exercise. For example, while California has permitted its public school buildings to be used in the evening for non-school meetings such as, for example, political discussions it is not required to do so. As this Court has said in *Ellis v. Dixon* (1955) 349 U.S. 458, 459:[88]

> "Petitioner concedes that a State may withhold its facilities altogether from use by nonscholastic groups. * * *"

The right of free speech does not permit the use of publicly owned property which is not open to the public. *Adderley v. Florida* (1966) 385 U.S. 39, 47.[89]

The court said in *Application of Hooker* (1955) 208 Misc. 188, 143 N.Y.S.2d 750, 755:

> "While there are constitutional rights of free speech and freedom of assembly, there is no constitutional privilege to exercise these rights in a fire house auditorium. There is no constitutional

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[88]75 S.Ct. 850, 852, 99 L.Ed. 1231, 1234 (rehearing denied 350 U.S. 855, 76 S.Ct. 37, 100 L.Ed. 759).

[89]87 S.Ct. 242, 247, 17 L.Ed.2d 149, 156 (rehearing denied 385 U.S. 1020, 87 S.Ct. 698, 17 L.Ed.2d 559).

obligation to let the premises out to petitioner. The action of the respondents in refusing a permit to the petitioner was not directed against the right of free speech or the right of freedom of assembly, but was concerned solely with the use of a portion of premises entrusted to their exclusive control."

In *West Tennessee A.C.L.U. v. City of Memphis* (1971) 323 F.Supp. 234 at 237 the court said:

> "The Court also is of the opinion there is no inherent constitutional right to compel public officials to open municipal buildings to the public for use as an office *even in the exercise of free speech and assembly.* * * *" (emphasis added.)

In 454 F.2d 1162 this case was reversed on the ground that the District Court also had decided that the granting of office space to another organization was beyond the power of the city and that that was a matter of state law to be decided by the state courts. The A.C.L.U. petitioned for a writ of certiorari which this Court denied. 409 U.S. 879.[40] Nothing in the opinion of the Court of Appeal or the denial of ceritorari cast any doubt on the validity of what we have quoted from the opinion of the District Court.

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[40] 93 S.Ct. 133, 34 L.Ed.2d 133.

CONCLUSION

It is respectfully submitted that for the reasons herein stated Section 6554 of the Elections Code should be held constitutional and the judgment of the Supreme Court of California affirmed.

Respectfully submitted,

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